ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION I

CA05-1012

May 24, 2006

In the Matter of the Estate of
CARL R. BROOKS, Deceased
MARIE THURMAN; TERRI WARD;
JENNIFER GRIFFEN; and RAY BROOKS
APPELLANTS

AN APPEAL FROM HOT SPRING
COUNTY CIRCUIT COURT
[CV03-281-2]

V.

HON. PHILLIP H. SHIRRON, JUDGE

CAROL GEER
APPELLEE

AFFIRMED

Carl Brooks died December 25, 2002. His last will and testament left his entire estate to his daughter, appellee Carol Geer. The will explicitly excluded his other two daughters, appellants Marie Thurman and Terri Ward, and the children of his predeceased son Charles Brooks, appellants Jennifer Griffen and Ray Brooks. Appellants appeal from the circuit court's finding that they did not present sufficient evidence that Carl and his wife Gladys had a contract for irrevocable reciprocal wills. We hold that the circuit court's ruling was not clearly erroneous; accordingly, we affirm.

Gladys and Carl Brooks executed virtually identical wills on October 19, 1979. Both wills provided that their entire estate would go to the surviving spouse upon their death. Both wills also provided that their four children, Carol Geer, Marie Thurman, Terri Ward and Charles Brooks, would receive equal shares of the estate if his or her spouse had already passed away or the two died simultaneously. Both wills appointed Charles as executor. Gladys passed away on August 24, 1985; accordingly, her entire estate went to Carl. Charles

died on September 10, 1988, and was survived by his wife, Charlene Sumler, and two children Jennifer Griffen and Ray Brooks. On August 5, 2002, Carl executed the will that is the center of the present controversy, wherein he left his entire estate to Carol.

Appellants filed a complaint in the Hot Spring County Circuit Court on October 27, 2003, alleging that Gladys and Carl agreed to distribute their estates according to the 1979 wills and seeking distribution of Carl's estate according to the provisions of his 1979 will. They filed a motion for summary judgment on July 29, 2004. Included with the motion for summary judgment were affidavits from Marie, Terri, Shannon Benning (Marie's daughter), Jimmy Thurman (Marie's husband), and Charlene Sumler, each stating in part that Gladys and Carl agreed to leave their estates equally to the four children. Carol responded to the motion by denying the existence of any such agreement between Gladys and Carl and by submitting her own affidavit, wherein she denied being told about any such agreement or giving deposition testimony that the two had agreed not to change the 1979 wills. The circuit court denied the motion for summary judgment in an order filed October 18, 2004, and trial was held on March 10, 2005.

Marie testified that the family talked about everything around the kitchen table and that during Thanksgiving 1979, Carl said, "Your mother and I have something to tell you. We have sat down at this table for hours and have made our final arrangements. We have drawn up our wills to provide for all of you children to be equal and everything as fair as possible." She stated that Carl would often reaffirm this arrangement and specifically noted that, about a week before her death, Gladys told Carl, "Carl, you know now it's up to you. We know what we made for our children, we made them our life we have kept them together and I want to know that you are going to keep the family together. I want to leave this world knowing that our decisions, our agreement was made for our children to keep them equal and fair and will be carried out by you after I am gone." Carl replied, "You know we did that

together and you know I am going to do what you want me to do. I promise the agreement we made is going to be carried out until the day I meet you on the other side."

Marie stated that, when Charles passed away in 1988, Carl changed his will to have the three daughters split his estate. She was unaware of any problems between Carl and Charles's children. She stated that everything "started going downhill in 1995." For example, Carol and her husband had purchased a home, and Carl was upset because Carol had put some treetops on Carl's property. Carol asked Marie to act as a peacemaker, but Carl became upset and accused Marie of taking Carol's side. He would state, "You girls do not deserve anything your mother and I have left. I am just going to leave everything to the church." According to Marie, Carl's health had gone down in 1999, but he would still go out with his female companion. During this time, Carol lived next door to Carl and did not work, while Marie and Terri lived out of town and had full time jobs. Occasionally, Marie would take off work and help Carol bring him food. After his female companion died in 2001, Carl told his daughters, "Your mother and I have provided well for you girls, you are going to be rewarded for your kindness and help to me when the good Lord calls me home."

On cross-examination, Marie testified that both the 1979 will and the 1988 will were prepared by Malvern attorney Joe McCoy. Attorney Toney McMillan drafted the 2002 will. Marie was unaware of any other wills. She acknowledged that Carl never told her that he could not change the will and that she never objected to the execution of the 1988 will.

Terri testified that she last spoke to Carl about the will in Easter 2002 and that Carl told her that he wanted her to take care of things for him. She stated that Gladys never said anything about changing her will, but she (Gladys) was concerned that Carl might want to change something. On cross-examination, she stated that she was aware Carl executed the 1988 will because he told her that he was taking Charles out of the will. Terri stated that she never objected to the change because she assumed he was merely making a change to the

executor of the will. She understood that under the 1979 will, Charles's share would be split between his two children, while under the 1988 will, the two would receive nothing.

Charlene testified that she was around Gladys and Carl "quite a bit" in the early years. She noted that she talked about the wills once with Gladys and that Gladys told her that the home place would go to Terri and the land with the minnow ponds would go to Charles. Charlene stated that the estate was to split as equally as possible. On cross-examination, she stated that she did not know whether there were any prohibitions against changing the will. Also, Shannon Benning and Jimmy Thurman each testified about the aforementioned bedside conversation between Gladys and Carl, noting that Gladys wanted Carl to promise her that they would keep the will.

Carol testified that her parents did not tell her that they had an agreement to make a will. She only recalled that Gladys and Carl said that they made the wills as fair as possible and did not recall any conversations shortly before Gladys's death.[1] She also stated that Carl

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[1]Appellants entered the following excerpt of Carol's deposition testimony into evidence:

> Q: . . . Do you know if your mother and father ever had any agreement to leave certain property, after both their deaths? Do you know if they ever had any such agreement?
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> A: Only what I was told.
>
> Q: What were you told?
>
> A: That they had agreed on a will, and that's the one that I'm going to provide you with?
>
> Q: So you were told that your mother and dad had agreed on a will?
>
> A: Yes, they had drawn up a will. There was a will on file.
>
> Q: On file up at the courthouse?
>
> A: Uh-huh.

executed the 1988 will shortly after Charles's death and that the 1988 will excluded Charles's children. As far as she knew, no one had a copy of that will.

Marie was recalled to testify, and she stated that before October 1979, she did hear Carl threaten to take a child out of the will. She stated that Gladys was aware of these instances. Terri testified that she was also aware of these threats; however, Carl never changed his will despite those threats.

Attorney Toney McMillan testified that he met Carl in late July 2002 when he was invited to Carl's home. He stated that Carl had just returned from the hospital and was upset because Terri and Marie had stolen money from him. He stated that he prepared a complaint in conversion and a petition for a temporary injunction. He found the money and returned it to Carl eight to ten days later. McMillan stated that he also discussed drafting a new will with Carl and that Carl wanted to cut Terri and Marie out of his will. He testified that he saw the 1988 will and that Carl never discussed any prohibition against making a new will. He said that, if he had known about any prohibition against revoking the old will, he would not have prepared the 2002 will. On cross-examination, McMillan admitted that he never asked Carl if he had made any contracts to make a will or had an agreement that prevented him from doing a new will.

The court announced its findings from the bench. It stated that appellants had failed to produce clear, cogent evidence that Gladys and Carl agreed not to change their 1979 wills. The court specifically noted, "The description of Mr. Brooks' personality, volatility and temperament consistently described by every witness, leads one to the conclusion that Mr. Brooks was one who would never have agreed at any point in time in his life to be bound in

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Q: Who told you that?

A: Daddy and Mother, both, at one time or another.

any irrevocable situation involving his bounty." These findings were incorporated into an order filed March 30, 2005, from which appellants bring the present appeal.

We review traditional cases of equity, such as probate cases, *de novo*. *Conner v. Donahoo*, 85 Ark. App. 43, 145 S.W.3d 395 (2004). We review the lower court's findings of fact and affirms unless those findings are clearly erroneous or clearly against the preponderance of the evidence. *Id*. A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been committed. *Id*. In reviewing the lower court's findings, due deference is given to the circuit judge's superior position to determine the credibility of the witnesses and the weight to be accorded to their testimony. *Id*. Moreover, while an appellate court will not overturn a circuit court's factual determinations unless they are clearly erroneous, it is free in a *de novo* review to reach a different result required by the law. *Id*.

Before continuing, we note that, while appellants' argument addresses the alleged agreement between Gladys and Carl, their points on appeal are "1. Whether there is error to deny [appellants'] Motion for Summary Judgment?" and "2. Was the evidence adduced at the trial of this matter sufficient to demonstrate an agreement for reciprocal Wills?" The notice of appeal indicates that appellants are appealing from the judgment of the court filed March 30, 2005. Under Ark. R. App. P.–Civ. 3(a) (2005), "An appeal from any final order also brings up for review any intermediate order involving the merits and necessarily affecting the judgment." However, it is well settled that there can be no review from the denial of a motion for summary judgment. *See Amalgamated Clothing & Textile Workers Int'l Union v. Early Industries, Inc.*, 318 Ark. 524, 886 S.W.2d 594 (1994); *Cobb v. Leyendecker*, 89 Ark. App. 167, ___ S.W.3d ___ (2005). To the extent that appellants argue the circuit court erred in denying summary judgment, the issue is not properly before this court. We only address the final judgment in this case.

Appellants argue that the evidence adduced at trial was sufficient to support a finding that Gladys and Carl executed irrevocable reciprocal wills. Arkansas law recognizes reciprocal wills as a legitimate estate planning device to effectuate the intent of a married couple to dispose of collective property. *Gregory v. Estate of Gregory*, 315 Ark. 187, 866 S.W.2d 379 (1993). A will is generally ambulatory until the death of the testator, and reciprocal wills may be revoked at the testator's pleasure unless founded on, or embodying, a binding contract. *Robinson v. Williams*, 231 Ark. 166, 328 S.W.2d 494 (1959); *Janes v. Rogers*, 224 Ark. 116, 271 S.W.2d 930 (1954). For wills executed prior to June 17, 1981,[2] a contract for reciprocal wills need not be expressed in the wills, but may arise by implication from circumstances that make it clear that the parties had such wills in mind and that they agreed to the terms of the testamentary disposition made therein. *Avance v. Richards*, 331 Ark. 32, 959 S.W.2d 396 (1998); *Iverson v. Dushek*, 260 Ark. 771, 543 S.W.2d 942 (1976).

The law places a very high burden of proof upon a litigant who alleges a binding contract not to alter or revoke a will. *Mabry v. McAfee*, 301 Ark. 268, 783 S.W.2d 356 (1990); *Morris v. Cullipher*, 299 Ark. 204, 772 S.W.2d 313 (1989). An oral contract to make a will to devise or to make a deed to convey real estate is valid when the testimony and evidence to establish such a contract is clear, cogent, satisfactory, and convincing. *Jones v. Abraham*, 58 Ark. App. 17, 946 S.W.2d 711 (1997). The evidence must be so strong as to be substantially beyond reasonable doubt. *Id.* The execution of a reciprocal will does not create a presumption of a contract not to revoke a will. Ark. Code Ann. § 28-24-101(b)(2); *see also Avance v. Richards*, *supra* (noting that, while the statute was inapplicable in that case, subsection (b)(2) amounted to a codification of the governing law).

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[2]Both appellants and appellee agree that Ark. Code Ann. § 28-24-101(b) (Repl. 2004), which requires contracts to make or not to revoke a will to be proven by a writing or an express reference in the will, is inapplicable to this case. *See also Jones v. Abraham*, 58 Ark. App. 17, 946 S.W.2d 711 (1997).

Appellants identify testimony from many parties showing Gladys's and Carl's intent to treat all four children equally in their wills. The testimony and the nearly identical wills are all of the evidence supporting their position. The evidence here, however, does not reach the standard of "clear, cogent, satisfactory, and convincing" evidence necessary to prove an agreement not to alter or revoke a will. In *Barksdale v. Carr*, 235 Ark. 578, 361 S.W.2d 550 (1962), our supreme court reversed the lower court's finding that the testator and her husband executed irrevocable reciprocal wills. There, the competent evidence consisted of nearly identical wills, which provided for all of the children equally; testimony that the testator told a third party that debts from unpaid rents incurred by her husband would be divided equally and deducted; and testimony that the testator's husband remarked, "[T]hey had everything fixed like they wanted it, one of their heirs wouldn't get any more than the other one." The court noted that the testimony showed that the testator and her husband had intended for all of the children to be treated equally, "but such intention does not establish a contract that would prevent the will of [the testator] from being revoked by her." *Id.* at 586, 361 S.W.2d at 555. The evidence there showed the intent of the parties but was far from proving that those intentions were irrevocable.

The case *Mabry v. McAfee*, *supra*, also involved reciprocal wills that left equal shares of the estate to the children. The appellant in that case contended that the testimony that the testator and her husband had intended for the children to be treated equally in the will was sufficient for meeting the burden of proving the existence of an agreement not to revoke the wills. The court first noted that the witnesses called on the appellant's behalf were all related to her by blood or marriage and that "their testimony did not have that degree of disinterest which would render it obligatory on the fact finder."[3] *Id.* at 271, 783 S.W.2d at 358.

[3]In the instant case, everyone who testified in favor of appellants' position that Gladys and Carl intended to execute irrevocable wills were either beneficiaries under the 1979

However, the court continued that, even if the appellant's proof were taken at face value, it was still insufficient to meet her burden of proof.

Similar to both *Barksdale* and *Mabry*, the only evidence supporting appellants' contention that Carl executed an irrevocable will are the identical wills and the testimony from interested parties stating Gladys's and Carl's intent to treat the children equally. Under Arkansas law, this proof is insufficient to establish an agreement not to revoke. Further, the record contains positive proof that Carl did not intend to execute an irrevocable will: the same attorney drafted both the 1979 and 1988 wills; the attorney who drafted the 2002 will would not have drafted said will had he thought the 1979 will was irrevocable; and Marie and Terri knew about but did not object to the execution of the 1988 will (under which Charles's children were disinherited).

The circuit court's ruling that appellants failed to present sufficient evidence that Gladys and Carl executed irrevocable reciprocal wills is not clearly erroneous. Accordingly, we affirm.

Affirmed.

GLADWIN and NEAL, JJ., agree.

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will (Marie Thurman, Terri Ward) or related to a beneficiary under the will (Charlene Sumler, mother of Jennifer Griffen and Ray Brooks; Shannon Benning, daughter of Marie Thurman; Jimmy Thurman, husband of Marie Thurman).